UNITED STATES
v.
ESTATE OF ALFRED N. HAWES ET AL.

IBLA 80-750 Decided January 21, 1981

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring eight mining claims invalid. AZ 9864.

Affirmed; decision adopted.

1. Mining Claims: Discovery: Generally

Where qualified mineral examiners testify that they examined and took samples from areas exposed by a mining claimant while working his claims, and where this examination and the assay of those samples reveal that mineralization in those areas was so slight as to be worth only a fraction of the costs of extracting it and was therefore insufficient to warrant exploitation, a prima facie case of invalidity of the claim is established. Where the claimant testifies that his claims were only a good prospect which would justify intensive exploration, this prima facie showing is not rebutted, and the claims are properly declared invalid.

APPEARANCES: James H. Watson, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On March 8, 1979, the Arizona State Office, Bureau of Land Management (BLM), filed a complaint contesting the validity of 13 lode mining claims owned by Alfred N. Hawes: The Jaeger Nos. 1 through 4; Hawkview Nos. 1, 2, 4, and 5; Badger Nos. 1 and 2; Lucido Nos. 1 and 2;

and Rainbow No. 2. The complaint alleged, inter alia, that valid mineral deposits have not been found within the limits of these claims so as to constitute a valid discovery within the meaning of the mining laws. Hawes filed a timely answer to this complaint on March 21, 1979, denying the allegations.

On August 31, 1979, BLM withdrew its complaint as to five of these claims, the Jaeger Nos. 1 and 4, Lucido No. 2, and the Badger Nos. 1 and 2, leaving eight still under contest. A hearing was held before Administrative Law Judge Robert W. Mesch on January 16, 1980, in Tucson, Arizona, at which BLM and Robert Rumsey, who had an option on the claims, appeared and presented evidence.

On June 3, 1980, Judge Mesch issued a decision in this matter in which he noted that Rumsey had withdrawn his answer insofar as it concerned four of these claims, the Hawkview Nos. 1, 2, 4, and 5, and had waived any rights to these claims. As to the remaining four claims, Judge Mesch concluded that BLM had established a prima facie case showing lack of discovery, and that the contestee had not rebutted this showing. Accordingly, he held all of these claims invalid. James H. Watson, successor to Hawes' and Rumsey's interests in these claims, appealed this decision. We concur with Judge Mesch's findings and adopt his decision.

[1] Watson raises three objections on appeal. First, he argues that the decision appealed from was made on evidence which was insufficient to establish a prima facie case. BLM's witnesses were qualified mineral examiners, and they examined and took samples from areas exposed by the claimant while working these claims in order to determine whether he had found mineralization there and, if so, whether it constitutes a valuable mineral deposit. This examination and the assay of these samples revealed that the mineralization in these exposed areas was so slight as to be worth only a fraction of the costs of extracting it, whether at today's prices or at those prevailing in 1955 when the claimed lands were withdrawn, and was therefore insufficient to warrant exploitation. Judge Mesch correctly concluded that these facts established a prima facie case of lack of discovery, under the authorities cited in his decision.

Appellant also argues that Judge Mesch's decision does not appropriately recognize the purposes of the Mining Act of 1872, which is, he argues, to encourage development of mineral resources on public land. This argument is unpersuasive. Judge Mesch's decision properly applies controlling interpretations of the Mining Act as they have evolved since its enactment, which interpretations have repeatedly been approved by the U.S. Supreme Court. See, e.g., United States v. Coleman, 390 U.S. 599 (1968).

Finally, appellant argues that invalidation of the claims might deprive the Papago Indian Tribe, described by appellant as "an underprivileged minority," of prospective employment opportunities, presumably in connection with development of his claims. Even assuming that such a benefit would devolve on this group, it would not justify our departing from the strictures of the Mining Act in order to give continued life to invalid claims.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing

Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

James L. Burski
Administrative Judge
ATTACHMENTS:

June 3, 1980

UNITED STATES OF AMERICA,	:	ARIZONA 9864
	:	
Contestant	:	Involving the Jaeger Nos. 2 and
	:	3, Hawkview Nos. 1, 2, 4, and 5
v.	:	(aka Hawk View), Lucido No. 2,
	:	and Rainbow No. 2 lode mining ALFRED N.
HAWES	:	claims located in the SW1/4 of T. 16 S., R. 6
E., (unsurveyed), GSR	Contestee	: Mer., Pima
County, Arizona.		

DECISION

Appearances: Fritz L. Goreham, Office of the Solicitor, Department of the Interior, Phoenix, Arizona, for contestant; Robert Rumsey, Tucson, Arizona, for contestee.

Before: Administrative Law Judge Mesch.

This is a proceeding involving the validity of eight lode mining claims located under the Mining Law of 1872, as amended, 30 U.S.C. § 22, et seq. The proceeding was initiated by the Arizona State Office, Bureau of Land Management, at the request and on behalf of the Bureau of Indian Affairs.

Pursuant to 43 CFR 4.451, the Bureau of Land Management issued a complaint on March 8, 1979, charging, among other things, that the subject mining claims are invalid because they have not been perfected by the discovery of a valuable mineral deposit. The contestee filed a timely answer and denied the charges in the complaint.

A hearing was held on January 16, 1980, at Tucson, Arizona. At the commencement of the hearing, Robert Rumsey advised that the named contestee was deceased and that he was appearing in behalf of the contestee's estate and also as the owner of an option to purchase the claims. The contestant has filed a posthearing brief.

The complaint originally sought the invalidation of 13 claims. Prior to the hearing, the contestant moved to withdraw the complaint with respect to five of the claims. The motion was granted. At the hearing counsel for the contestant stated that a mistake had been made in that the Lucido No. 2 claim, rather than the Lucido No. 1 claim had been listed in the motion to withdraw the complaint. The contestant requested that the complaint be amended to include the Lucido No. 2 claim rather than the Lucido No. 1 claim. Mr. Rumsey agreed to this procedure and the request was granted.

During the hearing, Mr. Rumsey stated that they would like to waive any claim whatsoever to the four Hawkview claims. I construe this action as a withdrawal of the answer to the complaint insofar as the Hawkview claims are concerned. Section 4.450-7 of 43 CFR provides that if an answer to the complaint is not filed, the allegations of the complaint will be taken as admitted by the contestee. Accordingly, I find that the four Hawkview claims are invalid because they have not been perfected by the discovery of a valuable mineral deposit as charged in the complaint.

The four remaining claims, i.e., the Jaeger Nos. 2 and 3, the Lucido No. 2 and the Rainbow No. 2, are situated within the Papago Indian Reservation. By an act of May 27, 1955, 69 Stat. 67, 25 U.S.C. § 463, Congress withdrew all land within the Papago Indian Reservation from all forms of exploration, location and entry under the mining laws. The claims were located prior to the date of that act.

The mining claims cannot be recognized as valid unless (1) all requirements of the mining laws were met on May 27, 1955, when the land was withdrawn from location and entry, and (2) the claims presently meet the requirements of the law. Cameron v. United States, 252 U.S. 450 (1919); Best v. Humboldt Placer Mining Company, 371 U.S. 334 (1963); United States v. Clemans, 45 IBLA 64 (1980).

The Department of the Interior and the Courts have held that (1) a mining claim does not create any rights against the United States and cannot be recognized as valid unless a valuable mineral deposit has been discovered within the

limits of the claim; (2) a valuable mineral deposit is an occurrence of mineralization of such quality and quantity as to warrant a person of ordinary prudence in the expenditure of time and money in the development of a mine and the extraction of the mineral, i.e., the mineral deposit that has been found must have a present value for mining purposes; and (3) mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify mining or development does not constitute a valuable mineral deposit, i.e., a valuable mineral deposit has not been found simply because the facts might warrant a continued search for such a deposit. Chrisman v. Miller, 197 U.S. 313 (1905); United States v. Coleman 390 U.S. 599 (1968); Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978).

When the government contests the validity of a mining claim it bears only the burden of going forward with sufficient evidence to establish a prima facie case. A prima facie case is made when a qualified mineral examiner testifies that he has examined the claim and found no mineralization sufficient to warrant exploitation. If a prima facie case is presented, the mining claimant then has the burden of showing by a preponderance of the evidence that the claim is valid, i.e., that he has actually found a mineral deposit of sufficient quantity and quality to justify the development of a mine. Hallenbeck v. Kleppe, supra; Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Porter, supra.

The sole function of a government mineral examiner in examining a mining claim is to verify whether the mining claimant has, in fact, found a valuable mineral deposit. He has no obligation to explore or sample beyond those areas which have been exposed by the claimant or to perform discovery work for the claimant. The purpose of such an examination is to determine whether the claimant has found mineralization and, if so, whether it constitutes a valuable mineral deposit. The examination is not intended to determine whether other mineralization might be found somewhere within the limits of the claim that might constitute a valuable mineral deposit. Hallenbeck v. Kleppe, supra; United States v. Porter, supra.

The contestant presented the testimony of a qualified consulting geologist who, based upon his education, experience, examination of the claims, and the assay results of sampling, expressed the opinion that the claims "did not

show mineralization of a character and type which would encourage a prudent man to invest his means and time in the hopes of developing a paying mine" (Tr. 39). The best sample he obtained from the four claims showed 0.030 ounces of gold and less than 0.01 ounces of silver per ton of material. He used figures of $600.00 an ounce for gold and $30.00 an ounce for silver and arrived at a value of $18.30 per ton. He estimated that it would cost $40.00 per ton to bring anything into production. The testimony of this expert witness constitutes a prima facie case in support of the allegation that the mining claims are invalid because they are not presently supported by the discovery of a valuable mineral deposit. The contestant did not present any evidence in its case in chief relating to the question of whether the claims were supported by a proper discovery at the time of the withdrawal in 1955.

The contestee presented the testimony of a qualified geologist who has been engaged in mineral exploration since 1965. He expressed the opinions based upon his education, experience, examination of the claims, and the assay results of sampling, that the veins on the claims "carry a general value of about .2 gold and .2 silver" (Tr. 63) and that the veins are "a candidate for commercial gold production" (Tr. 63). He also testified:

> Now as characteristic of so many high grade gold deposits, the values are sporadic along the vein. You can take a chunk of rock here and get one assay and a few inches away a slightly different one. But it's my feeling that with bulk sampling, one would come up with some values that would average in that .2 neighborhood.
> * * * * * * *
>
> These claims -- I've seen other areas that are similar to this where the next step was to go in an trench along the vein and take bulk samples, actually mine to two or three feet, and in this way you can establish average values even before drilling, and it certainly would be a justifiable procedure.

* * * * * * *

THE WITNESS: Well, I would say that -- I would have to say that these claims are

not ready for a mining operation today, but they're certainly ready for a [sic] intensive exploration program.

JUDGE MESCH: Let me ask you this and I don't want to be leading you. Would you say the claims today are anything more than a very good prospect?

THE WITNESS: Well, I don't see how that they're anything more than a very good prospect, unless we look at it from one point of view. Now mind you I don't really understand what the rules are, but we could start in here at the Lucido one and actually strip out -- strip that vein out over the 2,000 foot length over to the Lucido two and take out quite a few tons of gold and we'd probably make a hundred thousand dollars (100,000), and yes, if you would consider that a mining operation that would be justified. In fact I'm thinking very seriously of recommending it.

Now once again, how many tons do you have to move to call it a mining operation? I'd say to develop that hundred thousand tons from the ground down to 200 feet, I'd say it's not justified yet, but I certainly think that a stripper operation along the 2,000 feet is highly justifiable.

JUDGE MESCH: This would be on the two Lucido claims.

THE WITNESS: Yes, and the same thing would apply to the Jaegers. We could go in there with a back hoe and take out ore maybe down to four or five feet and make money at it.

So as I say, in a sense I think you'd have to say that is mining. (Tr. 63, 64, 67, 68)

The witness presented a map of the claims which showed the assay results of samples taken from each claim. The samples

were characterized as the "better samples" (Tr. 58). The five samples shown on the map yielded gold values ranging from 0.004 to 0.22 ounces and silver values ranging from 0.33 to 2.7 ounces per ton of material. An average of the five samples shows 0.056 ounces of gold and 1.012 ounces of silver.

I cannot conclude from the testimony of this witness that a valuable mineral deposit has been found within the limits of any one of the contested claims. I do not believe a prudent person, presented with the information provided by this witness, would spend time and money in a mining operation on any of the claims. He would first want to ascertain how the witness arrived at general values of 0.2 ounces of gold and 0.2 ounces of silver in view of the assay results of the better samples shown on the witness' map. If he was convinced that there was some merit to the witness' feeling that the veins carry such values, he would then, as recommended by the witness, trench along the veins and take bulk samples to establish average values that might be recovered in any type of a mining operation. A prudent person would not spend time and money in a mining operation without having some fairly definite information showing that the mineralization was of sufficient quality and occurred in sufficient quantity to justify its extraction.

Mr. Rumsey, who has an option to purchase the claims, also testified. He is an accountant by profession. He has been involved in mining ventures for the past three years and knows something about the economics of mining. He presented figures, based upon the best sample obtained from each claim, showing that each claim could be worked at a good profit. Mr. Rumsey's presentation does not show that a valuable mineral deposit has been found. It only shows that if the mineralization within the claims has average values equal to those found in the best samples and if the mineralization occurs in sufficient quantity, then a paying operation could be developed.

At best, the contestee's evidence simply shows that the claims might warrant further exploration in an effort to ascertain whether a valuable mineral deposit exists within the limits of each claim. This is not sufficient to meet the requirements of the mining law. A sharp distinction must be drawn between finding some mineralization (even of high potential value) and finding a valuable mineral deposit. In Barton v. Morton, supra, the Court quoted the following with approval:

It is nowhere suggested that any quantity of material of the quality of the

> vein matter thus far disclosed would constitute a mineable body of ore. The evidence does not, in fact, establish any mineral quality of any consistent extent. Although appellants have found ore samples with indicated values exceeding $70 per ton, the record does not support a finding that they have found a deposit yielding ore of that quality, or of any other quality, the exploitation of which may be contemplated * * *. (p. 291)

The eight contested mining claims are found to be invalid because they have not been perfected by the discovery of a valuable mineral deposit.

Robert W. Mesch
Administrative Law Judge

APPEAL INFORMATION

The contestee, as the party adversely affected by this decision, has the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken the adverse party, the Bureau of Land Management, can be served by service upon their attorney at the address listed below. In addition, a copy of the notice of appeal and of any statement of reasons, written arguments, or briefs, must be served on the Associate Solicitor, Division of Energy and Resources, whose address is: Office of the Solicitor, United States Department of the Interior, Washington, DC 20240.

Enclosure: Information Pertaining to Appeals Procedures